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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

S.S.,

Petitioner,

v.

THE SUPERIOR COURT OF SAN
DIEGO COUNTY,

Respondent;

SAN DIEGO COUNTY HEALTH
AND HUMAN SERVICES AGENCY
et al.,

Real Parties in Interest.

D077372

(Super. Ct. No. J520010A/B)

PROCEEDINGS for extraordinary relief after reference to a Welfare and Institutions Code section 366.26 hearing. Marian F. Gaston, Judge. Petition denied.

Niti Gupta for Petitioner.

No appearance by Respondent.

Thomas E. Montgomery, County Counsel, Caitlin E. Rae, Chief Deputy County Counsel, and Tahra Broderson, Deputy County Counsel, for Real Party in Interest San Diego County Health and Human Services Agency.

S.S. (Father) seeks review of a juvenile court order bypassing reunification services and setting a Welfare and Institutions Code section 366.26¹ hearing. Father argues the court did not appoint counsel for him in a timely manner, the San Diego County Health and Human Services Agency (Agency) failed to make reasonable efforts to locate him prior to the jurisdictional and dispositional hearing, and he was not properly notified of services being bypassed. Father requests reversal of the jurisdictional and dispositional orders and/or directions to the juvenile court to provide him with reasonable reunification services or to hold a new dispositional hearing.

For reasons we explain, the petition for extraordinary relief is denied.

FACTUAL AND PROCEDURAL BACKGROUND

Prior to Dispositional Hearing

Father and R.E. (Mother)² have a long history of illicit drug abuse, and he has an extensive criminal record dating back to 2002. In 2019, Mother and three-year-old Samantha were living in the home of maternal great grandmother (MGGM home). In late March 2019, Mother gave birth to a baby girl, M.S. The baby was born seriously ill with drugs in her system due to Mother's drug use. On April 3, 2019, the Agency filed a petition on behalf of Samantha and M.S. (together, the children) based on Mother's failure or inability to care for them (§ 300, subd. (b)).

¹ Further unspecified statutory references are to the Welfare and Institutions Code.

² Mother is not a party to the writ petition, and our discussion of her is accordingly limited.

The Agency's detention report dated April 4, 2019, indicated that Father's whereabouts were unknown, and he was not responding to efforts to find him. The Agency contacted various people to try and ascertain his whereabouts, including Mother, maternal great grandmother, Father's probation officer, and workers at the hospital where he had reportedly visited the baby. There was a warrant out for Father's arrest. According to Mother, she and Father had been in a romantic relationship for about five years. He had most recently lived with her at MGGM home until maternal great grandmother "kicked him out" and then he became homeless. Mother said she would still see him frequently "in the community." Maternal great grandmother confirmed that Father was no longer welcome in her home due to his drug use.

An Agency social worker noted in her report: "SPSW³ Nicolis has not made contact with the father despite efforts to contact the father through calling number provided [by Mother] for the father, asking mother to have father contact SPSW, conducting Who's In Jail Website search, and contacting father's probation officer for possible whereabouts of father. On 3/27/2019, the mother indicated the father is homeless and stays from friend to friend. She also explained the father's phone is not working and she has to call around to different friends to find him. SPSW Nicolis contacted Rady Children's Hospital and advised them the father has an active warrant. SPSW was advised by Hospital Social worker [that] law enforcement was contacted twice on 3/30/2019 due to father's warrant but officers did not bring father into custody. SPSW Nicolis has been advised the father has visited

³ SPSW stands for Senior Protective Services Worker, i.e., an Agency social worker.

the baby at the hospital on several occasions and has been appropriate. He has not responded to Agency efforts to get a hold of him."

At the detention hearing, the court elevated Father to presumed father of Samantha and detained the children out of home. The court ordered the Agency to continue searching for Father, notify him of the dependency proceedings, and provide a status update by the time of the next hearing.

In the interim, the Agency performed search inquiries from numerous sources, including the records of DMV, welfare, prison, court, sheriff, other governmental agencies, and online search engines. Several sources recurrently yielded four previous home or mailing addresses associated with Father between 2015 and 2019, including the address of MGGM home. By April 9, the Agency sent notification letters to Father at each of these four addresses via certified mail.⁴ It did not receive any response back. The Agency's search efforts were detailed in a Declaration of Due Diligence dated April 25, 2019, signed under penalty of perjury.

Further, the Agency's jurisdiction and disposition report of the same date indicated that a social worker had dialed all six phone numbers associated with Father, listed in the Declaration of Due Diligence. Three of the phone numbers connected to unrelated people, and the social worker left a voicemail at one phone number that played a generic voicemail recording. The Agency did not receive a call back.

Father was absent from the jurisdictional and dispositional hearing on April 25. The court took jurisdiction over the children, removed them from Mother's custody, and ordered reunification services for her. The court found the Agency was diligent in trying to locate Father and ordered continued

⁴ The letters gave Father notice of the jurisdictional and dispositional hearing on April 25, 2019 and provided a social worker's contact information.

search efforts. The Agency was also actively involved in finding relative placements for the children.

After Dispositional Hearing, Father is Located

On May 30, 2019, maternal grandmother called social worker José Cintrón and reported that Father was "in jail." In June, a correctional counselor with the county jail inquired of Cintrón whether Father was able to receive reunification services. Cintrón learned that Father had been sentenced to three years in state prison and communicated back to the correctional counselor that the length of Father's prison term prevented him from receiving services.⁵

On July 3, Cintrón made telephonic contact with Father, who was still housed at the local county jail. During the call, Cintrón advised Father of his status as presumed father, his right to counsel, and the "current legal situation." Cintrón further explained the permanency plan options and that the Agency was focused on placing the children with family members. Father reportedly stated that "he was not going to pursue representation and wanted to have the girls move to the respective identified [family members] as soon as possible." Cintrón told Father he would be produced for the upcoming special hearing and he could change his mind on whether he wanted legal representation.⁶ Father did not know when he would be transferred to state prison.

⁵ The superior court's felony minutes pronouncing judgment are dated May 30, 2019.

⁶ Cintrón's communications with Father were relayed to the court in an addendum report filed August 13, 2019.

On July 11, 2019, the Agency filed a section 388 motion, seeking to terminate Mother's services and bypass services for Father under section 361.5, subd. (e). The motion noted that Mother and Father had been sentenced to four and three years in prison, respectively, and that they would be incarcerated beyond the reunification period. The Agency argued it was in the best interest of the children to be permanently placed with relatives as soon as possible.⁷ The court set a special hearing on the matter in August.

At the August special hearing, Mother's counsel requested a continuance so that Mother, who had been transferred to state prison, could be produced. Father had also been transferred to state prison and was not present. The Agency's counsel reported that Father did not want an attorney per his prior communication with the social worker and that the Agency would nevertheless see if he wished to be produced for the continued hearing. The court confirmed the next hearing date of October 21.

On September 23, 2019, an Agency staff person served a notice of the October hearing on Father at Chino State Prison via mail. The notice informed Father that the Agency was recommending termination of reunification services and setting a section 366.26 hearing. Further, the notice advised generally that parents were entitled to be present at the hearing with counsel and indigent parents should notify the juvenile court's clerk's office if counsel was desired. The notice and proof of service were filed with the court.

⁷ It does not appear the Agency served the section 388 motion on Father at the correct address. The proof of service indicates the motion papers were sent to a federal correctional facility purportedly located at 1703 Front Street, but Father's address at the time was listed elsewhere in Agency reports as 1173 Front Street, which is the address of the county jail.

In mid-October, the Agency filed an addendum report in anticipation of the upcoming hearing. In that report, Cintrón noted that Father was not in local custody and that Cintrón had twice tried to reach him telephonically at Chino State Prison to get an update on his status. Meanwhile, the Agency was in frequent contact with both paternal and maternal relatives, who were interested in having the children permanently placed with them. Baby M.S. had been placed with a paternal aunt, and the Agency was continuing its assessment of maternal relatives for Samantha.

In a letter to the juvenile court dated October 17, 2019, maternal grandmother wrote that Father had "never been served or made aware of [the upcoming] court date." She indicated in her letter that Father had called her and claimed he did not decline counsel.

At the October 21 hearing, the Agency's counsel reported Father's "seeming communication through his family that he does want counsel appointed to represent him and does not feel he was properly noticed of today's hearing, even though we do have actual physical notice to him of today's hearing. . . ." The Agency requested a five-week continuance "so Ms. [Cindy] McCabe has time to reach out to [Father] and to review again his right to the appointment of counsel and the legal issues here today." Attorney McCabe was present in the court room as a "friend of the court" and asked to remain as such until she could make contact with Father and ascertain whether or not he wished to have counsel. She agreed to prepare an order to produce him for the next hearing date and provide him with information, as appropriate. The hearing was continued to December.

Father is Appointed Counsel

The parties reconvened in December 2019, with Father appearing. The juvenile court formally appointed counsel (McCabe) for him, who promptly

requested a copy of the file and a continuance, so she could fully investigate the case. No party objected to this (or any prior) request for continuance, and the court continued the matter to January 2020.

On January 23, 2020, the date set for the continued hearing, Father filed section 388 and *Ansley*⁸ motions, alleging a denial of due process and requesting reunification services. Father's motions were premised on his argument that he was not properly notified of various hearings and not timely appointed counsel. Regarding whether a change of order would be in the best interest of the children, Father asserted that he "loves his children," he voluntarily traveled from state to local custody to pursue reunification, and the case was in its early stages. The court elevated Father to presumed father of M.S. and continued the hearing so the Agency could review and respond to his motions.

On February 14, 2020, the court denied Father's motions, finding that the Agency's search efforts had been reasonable and social worker Cintrón's report of his communication with Father, wherein Father declined counsel, was credible. Furthermore, even if the Agency's search efforts were flawed in some manner, the court found that Father had not made a prima facie showing that granting him reunification services would be in the best interest of the children.⁹

At the contested hearing on the Agency's section 388 motion, the court received in evidence, without objection, various Agency reports and Father's

⁸ *Ansley v. Superior Court* (1986) 185 Cal.App.3d 477, 481 (*Ansley*) [holding that section 388 motion is a proper vehicle to raise a due process challenge based on lack of notice].)

⁹ Father's appeal from the orders made on this hearing date is currently pending in this court, case number D077303.

section 388 motion papers, all of which detailed the factual background leading to the court's dependency jurisdiction, the parents' prison sentences, and procedural history thus far. After considering the evidence and arguments of counsel, the court granted the Agency's section 388 motion, terminated Mother's services, and bypassed services as to Father.

Father timely filed a notice of intent to file a writ petition under California Rules of Court, rule 8.450. We address his arguments below in the order he has presented them.

DISCUSSION

I. *The Court Appointed Counsel for Father in a Timely Manner*

Father argues the juvenile court erred in waiting until December 2019 to appoint counsel for him. He contends he was "located" at least by July 2019 and should have been appointed counsel at that time since he did not knowingly waive his right to counsel.

Under section 317, a juvenile court must appoint counsel for an indigent parent when the Agency recommends the child be placed in out-of-home care, "unless the court finds that the parent or guardian has made a knowing and intelligent waiver of counsel as provided in this section." (§ 317, subd. (b).) Other statutes direct the juvenile court to address the appointment of counsel at the initial or detention hearing (§ 316; see Cal. Rules of Court, rule 5.534(d)(1)(B)) and at the beginning of the hearing on a petition if a parent "desires to be represented by counsel" and cannot afford one (§ 353).

"Generally, however, counsel is only to be appointed for an indigent parent when that parent 'appears and requests such appointment *or otherwise communicates to the court such a desire.*' " (*In re Andrew M.* (2020) 46 Cal.App.5th 859, 864-865.) Section 317 "requires the indigent parent to

communicate in some fashion his or her desire for representation before the juvenile court is obligated to appoint counsel" (*In re Ebony W.* (1996) 47 Cal.App.4th 1643, 1647 (*Ebony W.*))

When a petitioning agency has served notice of a hearing or made reasonable efforts to locate a parent for service, and the parent does not appear or manifest interest in obtaining representation, the juvenile court is not obligated to appoint counsel. (*Ebony W.*, *supra*, 47 Cal.App.4th at p. 1648.)

Applying the foregoing principles, we conclude the juvenile court did not err in waiting until December 2019 to appoint counsel for Father. As we will discuss *post*, the Agency made reasonable efforts to locate Father prior to the jurisdictional and dispositional hearing, yet he could not be found. The court could reasonably infer he was evading the Agency's efforts. When Father surfaced a month or so later, he was in jail. Per social worker Cintrón's report, which the court found credible, Father declined counsel at that time. Given Father's expected three-year incarceration in state prison and his agreement to the children's placement with family members as soon as possible, it stands to reason that he was unconcerned with obtaining counsel or securing reunification services. Regardless of whether his communication with the social worker constituted a knowing and intelligent waiver of counsel, the juvenile court had no reason to believe Father desired representation.

When the Agency and court had an inkling that Father might want counsel, the proceedings were continued so that his eventually-appointed attorney could investigate the matter. Once attorney McCabe confirmed that Father wanted counsel (in December), the court appointed her to represent him. Father has not established any error in these proceedings. In any

event, even if there was some delay in appointment, the Agency's section 388 motion to bypass services was continued until Father's counsel was fully apprised of the case history and had sufficient time to respond. If the motion was heard closer to July 2019, we are not persuaded the result would have been any different. Thus, any error was harmless.

II. *The Agency Made Reasonable Efforts to Locate Father*

Father argues the Agency failed to make reasonable efforts to locate him before the jurisdictional and dispositional hearing. He claims the Declaration of Due Diligence was insufficient insofar as certain results were still pending at the time of the hearing and the social worker was not diligent in her efforts relating to Father's probation officer.

"Due process requires that a parent is entitled to notice that is reasonably calculated to apprise him or her of the dependency proceedings and afford him or her an opportunity to object. [Citation.] The child welfare agency must act with diligence to locate a missing parent. [Citation.] Reasonable diligence denotes a thorough, systematic investigation and an inquiry conducted in good faith." (*In re Justice P.* (2004) 123 Cal.App.4th 181, 188.) Conversely, "there is no due process violation when there has been a good faith attempt to provide notice to a parent who is transient and whose whereabouts are unknown" (*Ibid.*)

The welfare agency fails to exercise reasonable diligence when it ignores the most likely means of finding the parent. (*David B. v. Superior Court* (1994) 21 Cal.App.4th 1010, 1016 [father listed on baby's birth certificate as a member of the U.S. Marines, yet agency failed to inquire of that organization]; *In re Arlyne A.* (2000) 85 Cal.App.4th 591, 598-599 [agency ignored information that father was living with his parents in Rialto]; see also *In re Melinda J.* (1991) 234 Cal.App.3d 1413, 1418 (*Melinda*

J.) [conducting extensive search, sending certified letters to last known addresses, and notifying the grandparents, was adequate in the case of a transient parent].)

Based on our review of the record, the Agency exercised reasonable diligence in its search efforts. It is of little consequence that a few search results were still pending at the time of the jurisdictional and dispositional hearing because a number of searches had already revealed Father's last known addresses within the past few years. Certified notice letters were sent to each of his last known addresses. Father does not suggest on appeal that the pending searches would have revealed a different address where he might have been located. The court could reasonably infer that the pending searches would *not* reveal Father's current whereabouts, given the most updated information from Mother and maternal great grandmother that he was homeless.

Moreover, the Agency *did* reach out to Father's probation officer, but again, a reasonable inference to be drawn from the record is that Father was avoiding his probation officer due to the outstanding warrant for his arrest. By the time of the jurisdictional and dispositional hearing, the social worker had searched multiple databases even remotely associated with law enforcement, including the records of prison, jail, superior court, sheriff, and child welfare.

Importantly, the Agency did not ignore the most likely means of finding Father, which was information provided by Mother. She was frequently in contact with him, and the Agency followed up on leads she provided. The social worker tried to call the phone number Mother provided for him, and, upon learning that he had visited the baby at the hospital, tried to secure the cooperation of hospital personnel to find him. The social worker further

asked Mother to transmit a message to Father. In summary, the Agency's search efforts were adequate, but Father was not found. There was no due process violation. (*Melinda J.*, *supra*, 234 Cal.App.3d at p. 1418.)

III. *Father Has Not Established Reversible Error Relating to Notice Issues*

Father lastly argues he did not receive proper notice of the Agency's intent to bypass services under sections 358 and 361.5 because he was not properly notified of two events that would have alerted him to the Agency's allegations: (1) the jurisdictional and dispositional hearing held on April 25, 2019; and (2) the Agency's section 388 motion filed on July 11, 2019.¹⁰

As we have already discussed, the Agency met its noticing obligation as to the jurisdictional and dispositional hearing through its reasonably diligent search efforts. The court had no duty to order services for a parent whose whereabouts were unknown. (§ 361.5, subd. (b)(1); see also *Ebony W.*, *supra*, 47 Cal.App.4th at pp. 1645, 1648.)

Furthermore, when Father's whereabouts became known, he was in jail and the Agency learned of his three-year prison term. The Agency promptly filed a section 388 motion to bypass services. The motion filed July 11, 2019, does not appear to have been properly served on Father, who was in local county jail at the time. The Agency concedes the motion was mistakenly addressed to a federal correctional facility. This error was harmless, however, since no substantive action was taken on the Agency's section 388 motion until *after* counsel had been appointed for Father and he had notice of the Agency's recommendation. In particular, notice of the Agency's

¹⁰ Father's brief asserts he did not receive proper notice of a hearing that occurred on July 11, 2019, but as the Agency points out in its response brief, no hearing occurred on July 11, 2019. We presume Father intended to argue that he was not properly served with the Agency's section 388 motion filed on July 11.

recommendation to bypass services was served on Father at Chino State Prison in September 2019, and he consulted with his attorney about the Agency's allegations. The hearing on the Agency's section 388 motion was continued until Father's counsel was fully prepared to defend him.

Father also argues he should have been allowed to plan for the children's care and receive services as soon as he was found in local custody. We disagree. As a noncustodial parent, Father was not automatically entitled to services or to have the children placed with him. (§ 361.2.) Prior to granting services to a noncustodial parent, a juvenile court is required to first determine that it would not be detrimental to the child to be placed with that parent. (§ 361.2, subds. (a), (b)(3).) Here, the court ultimately found that, given the length of Father's prison term, the children's young ages, and the initial reasons for their dependency, granting reunification services would be detrimental to them. Father has failed to establish reversible error.

DISPOSITION

The petition for extraordinary writ is denied.

McCONNELL, P. J.

WE CONCUR:

HUFFMAN, J.

HALLER, J.